

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Amendment to the Commission's Rules)	WT Docket No. 95-157
Regarding a Plan for Sharing)	RM 8643
the Costs of Microwave Relocation)	

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COMMENTS OF OMNIPPOINT CORPORATION

Omnipoint Corporation, by its attorneys, files these comments in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding.¹ Omnipoint supports the Commission's proposal to reduce the voluntary negotiation period for microwave relocation for PCS Block C, D, E, and F licensees. Indeed, Omnipoint urges the Commission to eliminate the voluntary negotiation period.

Small Business Licensees Cannot Afford the Delay to Market or the Exorbitant Payoffs Currently Exacted By Microwave Incumbents.

As Omnipoint and many other PCS providers demonstrated in the initial comments and reply comments in this proceeding, some microwave incumbent licensees are significantly abusing the voluntary negotiation process. Instead of using this period for orderly and expeditious relocation of their 2 GHz links, these licensees are holding up the commercial deployment of PCS with the threat of significant delay. Not only is this an abuse of these

¹ First Report and Order and Further Notice of Proposed Rule Making, WT Dkt. No. 95-157, RM-8643, FCC 96-196 (released April 30, 1996).

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licensees' obligation to operate in the public interest,² it significantly impedes Congress' and the Commission's goals for rapid introduction of competitive mobile services. Unfortunately, the Commission decided in the First Report and Order that it would not revise the voluntary negotiation period that commenced on April 5, 1995 for all Block A and B licensees. First Report and Order, at ¶ 13.

For several reasons, the public interest is better served by elimination of the voluntary negotiation period for future Block C, D, E, and F PCS licensees. Most important, it will promote opportunities for small business PCS operators. Small businesses, even more than Block A and B licensees, cannot afford the deployment delays due to an obstreperous microwave incumbent. These small businesses will be the last entrants into an extremely competitive local market, facing immediate competition from some much larger Block A and B licensees and two entrenched cellular providers. Delaying the deployment of small business PCS systems only so that microwave incumbents can reap "premiums" before they give their consent to relocation undermines the Commission's continuing public interest goals. *Cf.*, Sixth Report and Order, 11 FCC Rcd. 136, 136 (1995) (expedition of auction is necessary for "promotion of rapid delivery of additional competition to the wireless marketplace by Block C licensees"); Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd. 6589, 6594-95 (1993) ("Undue delay would be inconsistent with the public interest in fostering and implementing new services that utilize emerging technologies as quickly as possible.").

Moreover, small business licensees are less able to afford either the time or the expense of the voluntary negotiation process. Unlike some A and B licensees backed by

² See 47 U.S.C. 310(d) (license applications to be granted only when the "public interest, convenience, and necessity will be served thereby"); Omnibus Budget Reconciliation Act of 1993, § 6002(d)(3) (FCC is to provide rules which promote "orderly transition" of spectrum to commercial use).

telecommunications giants, small business licensees cannot pay the high premiums that are paid and/or demanded during the voluntary period. Moreover, unlike some A and B licensees, many small businesses cannot afford to devote significant management time negotiating with the sophisticated consultants hired by some microwave incumbents. Thus, the voluntary negotiation period is likely to be even less successful with small business licensees than it has been with A and B licensees.

This problem of unequal bargaining power is particularly troublesome for 10 MHz Block D, E, and F licensees. Because a typical private OFS system can completely block a 10 MHz PCS system, the microwave incumbent can totally frustrate a 10 MHz small business PCS operator from any system deployment for either the full voluntary negotiation period (lasting two or three years) or until the small business pays the premium demanded. Under these circumstances, there is no realistic possibility of truly voluntary negotiation between parties with equivalent bargaining power. Instead, the voluntary period could devolve into a second spectrum fee from the small business to the private OFS licensee. Again, there is no public interest goal served by protecting this pay-off.

The Commission's decision not to eliminate the voluntary negotiation period for Block A and B licensees³ underscores the need for a change with respect to Block C, D, E, and F licensees. First, unlike Blocks A and B, the licenses for Blocks C, D, E and F have yet to be issued, and so there are no on-going negotiations which could be disrupted. Equally inapplicable for the Block D, E, and F licenses is the Commission's concern that Block A and B bidders had already taken the costs of voluntary negotiations into account. As for the Block C bidding, it is

³ The Commission gave two reasons for its decision: (1) A and B licensees were aware of the voluntary negotiation period when they bid on their licenses; and (2) on-going voluntary negotiations for relocation may be disrupted by changing the voluntary period at this time. First Report and Order, at ¶ 13.

difficult to know what, if any, effect the costs of voluntary negotiations had on the bidding generally because such costs are extremely speculative and difficult to calculate. Moreover, Block C bidders may also have discounted voluntary negotiation costs on the premise that the Commission would change its then-pending microwave relocation rules in this very proceeding.

Finally, we note that microwave incumbents operating at 2 GHz have known since 1992 that they would be required to move from their current spectrum allocation. See First Report and Order, and Third Notice of Proposed Rulemaking, 7 FCC Rcd. 6886, 6890 (1992). While the voluntary period was intended to "prevent disruption of the existing 2 GHz services" and "prepare for relocation,"⁴ the microwave incumbent community has now had nearly four years to prepare for the day when they will be relocated to another part of the radio spectrum.⁵ Even with mandatory relocation, the Commission's rules adequately ensure that incumbents are provided with fully comparable replacement systems outside the 2 GHz PCS band, and compensation for all reasonable costs associated with the relocation. Thus, Block C, D, E, and F licensees should not be forced to make additional "premium" payments to microwave incumbents unwilling to accept comparable facilities in other spectrum bands, such as 6 GHz.

⁴ Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd. at 6595.


⁵ The Commission has re-allocated five specific spectrum bands for this relocation. Second Report and Order, 8 FCC Rcd. 6495 (1993).

For the foregoing reasons, Omnipoint urges the Commission to eliminate the voluntary negotiation period with microwave incumbents for PCS Block C, D, E, and F licensees.

Respectfully submitted,

OMNIPOINT CORPORATION

By:



Mark J. Tauber

Mark J. O'Connor

Piper & Marbury L.L.P.
1200 19th Street, N.W.
Seventh Floor
Washington, D.C. 20036
(202) 861-3900

Its Attorney

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